DAE HANGURU INFRA SDN BHD v. BALDAH TOYYIBAH (PRASARANA) KELANTAN SDN BHD & ANOTHER APPEAL

FEDERAL COURT PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
MARY LIM FCJ
[CIVIL APPEAL NOS: 01(f)-32-11-2020(D) & 01(f)-33-11-2020(D)]
7 APRIL 2022

Abstract – *One of the essential requirements to form a valid contractual relationship is the meeting of the minds or consensus ad idem. A binding contract with one party cannot bind a third party without any proper novation being made to bind that new party; without such novation, there could just not be any binding agreement with the said new party.*

CONTRACT: *Parties – Novation – Formation of turnkey contractor responsible for implementation of project – Whether there was concluded contract – Whether letter of intent and letter of acceptance carried turnkey contractor's name – Whether turnkey contractor already incorporated when parties purportedly entered into contract – Whether there was novation of parties – Whether contract with one party could bind another party without novation being made to bind new party – Whether promoter-successor contract – Whether valid, enforceable and binding contract existed between parties – Whether mere negotiations*

CONTRACT: *Formation – Consensus ad idem – Formation of turnkey contractor responsible for implementation of project – Whether there was concluded contract – Whether letter of intent and letter of acceptance carried turnkey contractor's name – Whether turnkey contractor already incorporated when parties purportedly entered into contract – Whether company could enter into any contract before incorporation – Whether there was consensus ad idem – Whether valid, enforceable and binding contract existed between parties – Whether mere negotiations*

The Kelantan State Government had issued an open proposal to implement a highway project as a State project through the subsidiary of Perbadanan Menteri Besar ('second defendant'). Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd ('first defendant'), a subsidiary company, was incorporated as a special vehicle for the project. Consortium Daelim JV ('CDJV') expressed its interest to bid for the project and this led to a series of discussions which culminated into the State Government indicating its willingness to award the project to CDJV and CDJV requesting the State Government to issue a letter of intent ('LOI'). The first defendant issued a LOI, appointing CDJV as a turnkey contractor and instructing CDJV to nominate or incorporate a company as the turnkey contractor to implement the project. CDJV accepted

A the terms and conditions in the LOI and the first defendant issued a letter of acceptance ('LOA'), which the CDJV accepted. CDJV later notified the first defendant that Dae Hanguru Infra Sdn Bhd ('plaintiff') would be the turnkey contractor responsible for the implementation of the project. Following certain events that drew ambiguity to the actual contracting party, the first B defendant sought a clarification on the relationship between the plaintiff and CDJV. Instead of CDJV, the plaintiff replied stating that it was to be the turnkey contractor and that it obtained support from the majority of the CDJV members, except for Daelim Industrial Ltd, which had withdrawn from the consortium. Jurutera Perunding Zakie ('JPZ'), the first defendant's C project management consultant, sought confirmation from the consortium members on their alleged support of the plaintiff and, instead of affirming their support, each member proposed new ideas to the project which, coupled with the plaintiff's proposal, were found to have derailed from the original arrangement discussed with CDJV. The first defendant gave its ultimatum to the plaintiff to proceed with the original terms proposed by the D first defendant in its LOI and LOA and a deadline was set. The plaintiff was also to secure funding by a certain date or to withdraw from the project. The plaintiff requested for extension of time to the deadlines but the request was declined and its appeal to the Menteri Besar received no response. The first defendant later informed the plaintiff that it was unable to continue E negotiations due to the plaintiff's failure to comply with the LOA; all negotiations were considered lapsed and expired. This prompted the plaintiff to commence an action against the first and second defendants, at the High Court, for breach of contract. Allowing the plaintiff's claim against the first defendant and dismissing the claim against the second defendant, the High F Court held that: (i) there was a binding contract between the first defendant with CDJV and, later, with the plaintiff, and these were not mere negotiations; (ii) CDJV and the plaintiff were the same entity and the alleged contract concluded pursuant to the LOA issued by the first defendant had a binding effect between the first defendant and CDJV as well as the plaintiff; G (iii) the first defendant wrongly repudiated the contract, resulting in loss and damages suffered by the plaintiff; (iv) the purported agreement with CDJV had transformed into a promoter and successor contract with the plaintiff; and (iv) there was no binding contractual relationship with the second defendant. The first defendant appealed against the finding of liability against it ('Appeal 431') and the dismissal of its claim against the second defendant H ('Appeal 499'). The Court of Appeal, in allowing Appeal 431 and dismissing Appeal 499, found, *inter alia*, that: (i) the plaintiff was never a member of the consortium because, at the material time, the plaintiff was yet to be incorporated; (ii) there was no *consensus ad idem* to create a contractual relationship between the plaintiff and the first defendant; (iii) although there I was an attempt to substitute CDJV for the plaintiff as the contracting party,

it was not successful and, there was no evidence of any novation; and (iv) the plaintiff failed to establish any valid and enforceable contract under the law. Hence, the present appeals.

Held (dismissing appeals with costs; affirming decision of Court of Appeal)

Per Rohana Yusof PCA delivering the judgment of the court:

(1) One of the essential requirements to form a valid contractual relationship is the meeting of the minds or *consensus ad idem*. No contract had been concluded between the plaintiff and the first defendant because there was no *consensus ad idem*. The binding effect of the LOI and the LOA did not concern the plaintiff. These letters were all addressed to CDJV and not the plaintiff because the plaintiff never existed at the material time. (paras 45 & 46)

(2) The proposal of new terms in the plaintiff's proposal which differed from the ones stated in the LOI and the LOA issued to the CDJV was another compelling evidence against the plaintiff's case. There was no evidence that any of these terms had been agreed to by the first defendant at any point in time to constitute a valid agreement between them. (para 49)

(3) In law, a binding contract with one party could not bind another party without any proper novation being made to bind that new party. There could not be a binding agreement between the first defendant and the plaintiff even if there was a binding agreement between the first defendant and the CDJV. (para 52)

(4) In common law, a company is not bound by a pre-incorporation contract, because a company could not enter into any contract before incorporation due to a lack of legal entity. It has no separate legal existence until incorporation. Neither could it appoint an agent before incorporation. Thus, a company could not ratify an agent's action as any ratification has to be retrospective to the date of the transaction at which point the company was non-existent. In Malaysia, this common law position has been altered and enacted into ss. 35(1) and (2) of the Companies Act 1965 which has now been legislated slightly differently in ss. 65(1) and (2) of the Companies Act 2016. Had CDJV indicated at the outset that it was negotiating and was intending to enter into the agreement on behalf of the plaintiff, the first defendant would not need to clarify the status of the plaintiff *vis-a-vis* CDJV. (paras 64-68)

(5) The LOI and the LOA were never proved to be made for and on behalf of the pre-incorporated plaintiff. No one from either side testified at the trial and none of the plaintiff's witnesses even testified that Daelim Consortium was its promoter. There was no evidence that the said

agreement was either novated or assigned to the plaintiff to make it a party. Further, there were no documents or any other evidence to sustain that Daelim Consortium was the plaintiff's promoter. All of Daelim Consortium's documents showed that it was acting for itself. (para 74)

(6) In a promoter-successor scenario, the promoter should exit from the scene as soon as the successor is formed to take over. That was not the case here. The plaintiff and the first defendant continued to deal with Daelim Consortium on the contractual issues and never dealt with the plaintiff as if it were a successor. In evidence after the incorporation of the plaintiff, Daelim Consortium had visited and continued discussions with the State Government over the project together with its Korean bankers. JPZ too continued to communicate with CDJV on the costing of the project as well as the various comments on CDJV's proposal of the project. (para 78)

Bahasa Melayu *Headnotes*

Kerajaan Negeri Kelantan telah mengeluarkan satu cadangan terbuka untuk melaksanakan projek lebuh raya sebagai projek Negeri melalui subsidiari Perbadanan Menteri Besar ('defendan kedua'). Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd ('defendan pertama'), sebuah syarikat subsidiari, diperbadankan sebagai jentera khas demi projek tersebut. Consortium Daelim JC ('CDJV') menzahirkan minatnya untuk membida projek tersebut dan ini membawa pada satu siri perbincangan yang berkemuncak dengan Kerajaan Negeri menyuarakan kesediaannya mengawardkan projek tersebut dan CDJV memohon agar Kerajaan Negeri mengeluarkan satu surat niat ('SN'). Defendan pertama mengeluarkan satu SN, melantik CDJV sebagai kontraktor *turnkey* dan mengarahkan CDJV menamakan atau memperbadankan sebuah syarikat sebagai kontraktor *turnkey* untuk melaksanakan projek. CDJV menerima terma-terma dan syarat-syarat dalam SN dan defendan pertama mengeluarkan surat penerimaan ('SP'), yang diterima oleh CDJV. CDJV kemudian memaklumkan defendan pertama bahawa Dae Hanguru Infra Sdn Bhd ('plaintif') adalah kontraktor *turnkey* yang dipertanggungjawabkan untuk pelaksanaan projek tersebut. Ekoran beberapa peristiwa yang menimbulkan kesamaran tentang pihak sebenar yang berkontrak, defendan pertama meminta penjelasan tentang hubungan antara plaintif dan CDJV. Plaintif, dan bukan CDJV, membalas dan menyatakan CDJV adalah kontraktor *turnkey* yang menerima sokongan majoriti ahli-ahli CDJV, kecuali Daelim Industrial Ltd yang telah menarik diri daripada konsortium. Jurutera Perunding Zakie ('JPZ'), perunding pengurusan projek defendan pertama, memohon pengesahan ahli-ahli konsortium berikutan dakwaan sokongan terhadap plaintif dan, setiap ahli, sebaliknya, mencadangkan idea-idea baharu yang, ditambah dengan cadangan plaintif, didapati terpesong daripada

perancangan asal yang dibincangkan dengan CDJV. Defendan pertama memberi kata dua pada plaintif untuk meneruskan dengan terma-terma asal yang dicadangkan oleh defendan pertama dalam SN dan SP dan satu tempoh akhir ditetapkan. Plaintif juga perlu mendapatkan dana pada tarikh yang ditetapkan atau menarik diri daripada projek tersebut. Plaintif memohon lanjutan masa untuk tempoh-tempoh akhir tetapi permohonannya ditolak dan rayuannya pada Menteri Besar juga tidak berbalas. Defendan pertama kemudian memaklumkan plaintif bahawa defendan pertama tidak dapat meneruskan perbicangan atas kegagalan plaintif mematuhi SP; kesemua perbincangan dianggap tamat dan luput. Ini mendorong plaintif memulakan satu tindakan terhadap defendan pertama dan kedua, di Mahkamah Tinggi, atas pelanggaran kontrak. Membenarkan tuntutan plaintif terhadap defendan pertama dan menolak tuntutan terhadap defendan kedua, Mahkamah Tinggi memutuskan: (i) terdapat kontrak yang mengikat antara defendan pertama dengan CDJV dan, kemudian, dengan plaintif, dan bukan sekadar perbincangan; (ii) CDJV dan plaintif adalah entiti yang sama dan kontrak yang dikatakan diputuskan susulan SP yang dikeluarkan oleh defendan pertama mempunyai kesan mengikat antara defendan pertama dan CDJV dan juga plaintif; (iii) defendan pertama, secara salah, mengingkari kontrak, menyebabkan plaintif mengalami kehilangan dan kerugian; (iv) perjanjian dengan CDJV bertukar menjadi kontrak penganjur dan pengganti dengan plaintif; dan (v) tiada kontrak yang mengikat hubungan dengan defendan kedua. Defendan kedua merayu terhadap dapatan liabiliti terhadapnya ('Rayuan 431') dan menolak rayuan terhadap defendan kedua ('Rayuan 499'). Mahkamah Rayuan, dalam membenarkan Rayuan 431 dan menolak Rayuan 499, mendapati, antara lain: (i) plaintif bukan ahli konsortium kerana, ketika itu, plaintif belum diperbadankan; (ii) tiada *consensus ad idem* untuk membentuk hubungan kontrak antara plaintif dan defendan pertama; (iii) walaupun ada percubaan mengganti CDJV dengan plaintif sebagai pihak berkontrak, percubaan ini tidak berjaya dan, tiada keterangan tentang apa-apa novasi; dan (iv) plaintif gagal membuktikan apa-apa kontrak yang sah dan boleh dikuatkuasakan bawah undang-undang. Maka timbul rayuan-rayuan ini.

Diputuskan (menolak rayuan-rayuan dengan kos; mengesahkan keputusan Mahkamah Rayuan)

Oleh Rohana Yusof PMR menyampaikan penghakiman mahkamah:

(1) Salah satu syarat penting untuk membentuk hubungan kontrak yang salah ialah pertemuan minda atau *consensus ad idem*. Tiada kontrak yang dimuktamadkan antara plaintif dan defendan pertama kerana tiada *consensus ad idem*. Kesan mengikat SN dan SP tiada kaitan dengan plaintif. Surat-surat ini ditujukan pada CDJV dan bukan plaintif kerana plaintif tidak wujud pada masa itu.

A **(2)** Cadangan terma-terma baharu dan cadangan plaintif yang berbeza dengan yang dinyatakan dalam SN dan SP adalah satu keterangan kuat terhadap kes plaintif. Tiada keterangan bahawa mana-mana terma ini disetujui oleh defendan pertama pada bila-bila masa untuk membentuk satu perjanjian yang sah antara mereka.

B **(3)** Bawah undang-undang, satu kontrak mengikat dengan satu pihak tidak boleh mengikat pihak lain tanpa apa-apa novasi teratur yang dibuat untuk mengikat pihak baharu tersebut. Tiada perjanjian mengikat antara defendan pertama dan plaintif jika pun ada perjanjian mengikat antara defendan pertama dan CDJV.

C **(4)** Bawah common law, syarikat tidak terikat oleh kontrak pra-pemerbadanan kerana syarikat tidak boleh memeterai apa-apa kontrak sebelum pemerbadanan ekoran ketiadaan entiti undang-undang. Satu-satu syarikat tidak mempunyai kewujudan asing undang-undang hingga diperbadankan. Syarikat juga tidak boleh melantik ejen sebelum
D pemerbadanan. Oleh itu, syarikat tidak boleh meratifikasikan tindakan satu ejen kerana apa-apa peratifikasian perlulah retrospektif tarikh transaksi yang ketika itu syarikat tidak wujud. Di Malaysia, kedudukan common law ini diubah dan digubal dalam ss. 35(1) dan (2) Akta Syarikat 1965 yang kini digubal sedikit berbeza dalam ss. 65(1) dan (2)
E Akta Syarikat 2016. Jika sejak awal lagi CDJV menyatakan CDJV berunding dan berniat memeterai perjanjian bagi pihak plaintif, defendan pertama tidak memerlukan penjelasan status oleh plaintif bersangkutan CDJV.

F **(5)** SN dan SP tidak dibuktikan dibuat untuk dan bagi pihak plaintif sebelum plaintif diperbadankan. Tidak seorang pun daripada kedua-dua pihak yang tampil memberi keterangan semasa perbicaraan dan tidak seorang saksi plaintif yang memberi keterangan bahawa Daelim Consortium adalah penganjurnya. Tiada keterangan bahawa perjanjian tersebut dinovasi atau diserahhakkan pada plaintif untuk menjadikannya
G sebagai satu pihak. Tambahan lagi, tiada apa-apa dokumen atau apa-apa keterangan untuk menyokong bahawa Daelim Consortium adalah penganjur plaintif. Semua dokumen Daelim Consortium menunjukkan Daelim Consortium bertindak untuk konsortiumnya sendiri.

H **(6)** Dalam keadaan penganjur-pengganti, penganjur harus beredar sebaik sahaja penggantinya dibentuk untuk mengambil alih. Ini tidak berlaku dalam kes ini. Plaintif dan defendan pertama berurusan secara berterusan dengan Daelim Consortium tentang isu-isu kontrak dan tidak pernah berurusan dengan plaintif seolah-olah plaintif penggantinya. Dalam keterangan selepas pemerbadanan plaintif, Daelim Consortium

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telah melawat dan meneruskan perbicangan-perbincangan dengan Kerajaan Negeri tentang projek bersama-sama dengan ahli-ahli bank Korea. JPZ juga meneruskan dengan komunikasinya bersama-sama CDJV tentang kos projek dan juga beberapa komen tentang cadangan CDJV tentang projek.

Case(s) referred to:

Ahmad Salleh & Ors v. Rawang Hills Resort Sdn Bhd [1995] 4 CLJ 197 HC ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Black v. Smallwood [1966] ALR 744 ***(refd)***

British Steel Corporation v. Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504 ***(refd)***

Cosmic Insurance Corpn Ltd v. Khoo Chiang Poh [1980] 1 LNS 182 PC ***(refd)***

Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor [2015] 8 CLJ 1068 FC ***(refd)***

Kelner v. Baxter (1866) LR 2 CP 174 ***(refd)***

RTS Flexible Systems Ltd v. Muller GMBH & Co KG (UK Production) [2010] 1 WLR 753 ***(refd)***

Teras Kimia Sdn Bhd v. Kerajaan Malaysia [2013] 6 CLJ 219 HC ***(refd)***

The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd [2006] 1 CLJ 259 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 35(1), (2)
Companies Act 2016, s. 65(1), (2)
Contracts Act 1950, s. 71
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:

Nicholas Dennys & Robert Clay, *Hudson's Building & Engineering Contracts,* 13th edn, Sweet & Maxwell 2015, p 373

(Civil Appeal No: 01(f)-32-11-2020(D))

For the appellant - Cyrus Das, Selvarajah Sivalingam, James Lopez, Ramanathan RM Ramanathan & Joseph Tan Pin Ren; M/s Fernandez & Selvarajah

For the respondent - Azlan Sulaiman & Mohd Irwan Ismail; M/s Azmi & Assocs

(Civil Appeal No: 01(f)-33-11-2020(D)

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[Editor's note: For the Court of Appeal judgment, please see Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd v. Dae Hanguru Infra Sdn Bhd & Another Appeal [2020] 5 CLJ 27 (affirmed).]

Reported by Najib Tamby

A

JUDGMENT

Rohana Yusuf PCA:

Introduction

B **[1]** There are two appeals before us. Both appeals are lodged by the appellant, Dae Hanguru Infra Sdn Bhd (plaintiff). Civil Appeal No: 01(f)-32-11-2020 (D) (Appeal 32) is against the decision by the Court of Appeal in favour of Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd. In Civil Appeal No: 01(f)-33-11-2020 (D) (Appeal 33), the appellant is appealing against the decision of the Court of Appeal in favour of the Perbadanan Menteri Besar
C Kelantan.

[2] Since Appeal 33 is dependent on the outcome of Appeal 32, we agreed and allowed an oral application made by learned counsel for the respondent therein to proceed with Appeal 32 first. We then deferred the hearing of Appeal 33.

D

[3] In this judgment, parties will be referred to as they were in the High Court.

The Background Facts

E **[4]** The Kelantan State Government was interested to construct, finance, design and building a highway road from Kota Bharu to Kuala Krai (the project). In the year 2012, the State Government issued an open proposal to implement it as a State Project. It was to be implemented through the subsidiary of Perbadanan Menteri Besar (second defendant). The subsidiary company incorporated as a special vehicle for the project is Baldah Toyyibah
F (Prasarana) Kelantan Sdn Bhd (first defendant).

[5] Responding to the invitation, Consortium Daelim JV (CDJV) expressed interest to bid for the project. CDJV was a consortium led by Daelim Industrial Co Ltd. The consortium constituted 13 members as evidenced from their presentations and proposals on the project to the State
G Government in October 2012.

[6] A series of discussions were held between CDJV with the officers in the State Government including the representatives of the first defendant. During these discussions, the State Government had indicated its willingness
H to award the project to CDJV. In one of the minutes of the meeting, CDJV requested the State Government to issue a letter of intent to enable CDJV to arrange financing with banks in Korea.

[7] Following that request, the first defendant issued a letter of intent dated 8 October 2012 (LOI) to CDJV purportedly appointing CDJV as a
I turnkey contractor. In the same letter, CDJV was instructed to nominate or incorporate a company acceptable to the first defendant as the turnkey contractor to implement the project. Various other terms were also stated.

[8] Two days later CDJV indicated its acceptance of the terms and conditions contained in the LOI. The first defendant issued a further letter described as letter of acceptance dated 31 October 2012 (LOA) which contained more terms including requiring a guarantee that the maximum provisional contract price was to be at RM1.8 billion.

[9] In the LOA, CDJV was also required to provide evidence of incorporation of a turnkey contractor acceptable to the first defendant. In addition, the first defendant reiterated that the terms in the LOA would form part of a contract to be formalised in an agreement premised on the FIDIC conditions of contract.

[10] CDJV indicated its acceptance of the further terms of the LOA, three weeks after that. Then two weeks later on 5 December 2012, CDJV notified the first defendant that a legal entity or turnkey contractor responsible for the implementation of the project would be Dae Hanguru Infra Sdn Bhd (plaintiff), which was incorporated on 3 December 2012. Despite the formation of the plaintiff, CDJV about two weeks after that, on 17 December 2012 met with the State Government to discuss the possibility of a financial guarantee by the State. The request was declined by the State Government. More discussions took place between CDJV and the first defendant thereafter.

[11] Meanwhile, the first defendant appointed Jurutera Perunding Zakie (JPZ) as its project management consultant. JPZ focused on finalising arrangements with CDJV. JPZ requested CDJV's financial status, company profile, and proposals of work, with the purpose of trying to prepare a contract document between the first defendant and CDJV. However, the response instead came from the plaintiff on 21 January 2013. This was about the first time the plaintiff came into the picture. JPZ had on behalf of the first defendant requested for a performance security of RM7.5 million from the plaintiff but was told that it was pending its bank's scrutiny in Korea.

[12] In a meeting held on 29 January 2013, JPZ informed the plaintiff about a launching ceremony to be held on 19 February 2013 and a formal agreement which was expected to be signed on 27 February 2013. There was a need for site clearance for that purpose. At that meeting, the plaintiff suddenly circulated a purported draft agreement of the project which denoted the plaintiff as a party instead of CDJV.

[13] In addition to the draft agreement, the plaintiff issued further additional terms in its letter dated 12 February 2013 (plaintiff's proposals), this time focusing on financial matters, where the plaintiff requested the first defendant to make financial arrangements for the plaintiff, by making various proposals relating thereto. All these appeared to have perturbed the first defendant, which led to a letter of inquiry dated 18 February 2013 issued to CDJV.

[14] In that inquiry, a clarification was sought on the relationship between the plaintiff and CDJV. The first defendant alleged CDJV to have unilaterally changed the contracting party to the plaintiff. That notwithstanding, the first defendant said it could agree to that change provided the plaintiff was part of the CDJV and it was supported by Daelim Industrial Ltd. Further to that, the first defendant insisted for the plaintiff's paid-up capital to be increased. The first defendant also laid out further terms on repayment, parent company guarantee, the viability of new alignment, traffic study *etc*, which were also discussed therein.

[15] Pending the resolution of the above matters and an agreement to be concluded and signed, the first defendant agreed to pay the plaintiff only for site clearance for project launch, survey works and mobilisation expenses.

[16] CDJV did not reply to the queries by the first defendant. Instead, it was the plaintiff who explained and responded to the queries in a letter dated 1 March 2013. The plaintiff explained that it was to be the turnkey contractor and referred to the communications by the first defendant *viz*; the LOI, LOA and a letter by CDJV informing the first defendant that the plaintiff was the nominated contractor required by the first defendant. The plaintiff further stated that it obtained support from the majority of the CDJV members except for Daelim Industrial Ltd. It also informed the first defendant that Daelim Industrial Ltd had withdrawn from the consortium.

[17] On receiving the above information, JPZ immediately caused more inquiries over the plaintiff's statement. Upon inquiries, Daelim Industrial Ltd confirmed its withdrawal from the consortium. JPZ also wrote to each of the consortium members seeking confirmation on their alleged support of the plaintiff. The members responded to JPZ. Instead of affirming their support, each of them proposed all sorts of new ideas to the project. These new proposals coupled with the plaintiff's proposal were found to have derailed from the original arrangement discussed with CDJV.

[18] As a result, the first defendant gave its ultimatum to the plaintiff to proceed with the original terms proposed by the first defendant in its LOI and LOA. A deadline of 15 May 2013 was set by the first defendant. The plaintiff was also to secure funding by 30 June 2013, or to withdraw from the project.

[19] The request for extension of time to the above deadlines by the plaintiff was declined by the first defendant. The plaintiff continued to appeal to the Menteri Besar directly but received no response.

[20] On 13 October 2013, the first defendant wrote to the plaintiff stating that it was unable to continue negotiations due to the plaintiff's failure to comply with the LOA dated 31 October 2012 and the supplementary terms to LOA dated 18 February 2013. All negotiations were considered lapsed

and expired with effect from 1 July 2013. Thereafter, the first defendant set itself free to enter into negotiations with any other party in respect of the project.

[21] The plaintiff sued the first defendant together with the second defendant for breach of contract. Before the High Court, the plaintiff's case was that there was a binding contract between CDJV with the first defendant, which consequently bound the plaintiff being a successor of CDJV. The plaintiff also claimed that since the first defendant was wholly owned by the second defendant, and by virtue of the second defendant's active involvement in the negotiations relating to the project, the veil of incorporation of the second defendant should be pierced to attach liability to the second defendant for the alleged breach by the first defendant. This forms the basis of Appeal 33.

[22] Subsequently, the plaintiff alleged that both the first defendant and the second defendant are to be held liable to the plaintiff for breach of contract. Premised on the alleged breach of contract, the plaintiff sought for general damages, specific damages of RM5,488,497 for work done in reliance on the contract, plus interest and costs.

[23] The first defendant's defence was that there was no contractually binding relationship between the first defendant and CDJV. Their relationship, at best, was a mere negotiation towards a contract. As against the plaintiff, the first defendant pleaded that it never had the intention to contract with the plaintiff or treat the plaintiff to be one of the entities of CDJV.

[24] The second defendant's pleaded defence was that the first and the second defendants were two separate entities. The first defendant had been entrusted by the State Government to implement the project by creating a SPV in the first defendant. It was not denied that the first defendant was wholly owned by the second defendant. The second defendant, however, denied any contractual relationship with any party nor any contractual involvement in the project.

At The High Court

[25] After a full trial, the High Court allowed the plaintiff's claim against the first defendant and dismissed the claim against the second defendant. It found a binding contract was created between the first defendant with CDJV and "later" with the plaintiff. According to the learned trial judge, there existed a binding contractual relationship between parties and not mere negotiations as alleged by the first defendant. The High Court further agreed with the plaintiff that CDJV and the plaintiff were of the same entity and the alleged contract concluded on 31 October 2012 pursuant to the LOA issued by the first defendant had a binding effect between the first defendant and CDJV as well as the plaintiff.

[26] The learned Judicial Commissioner then relied on and applied the principle of promoter and successor under s. 35(1) of the Companies Act 1965, to find favour with the plaintiff's case. Reference was made to a decision of the Court of Appeal in *The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd* [2006] 1 CLJ 259; [2006] 1 MLJ 554.

[27] Ultimately, the first defendant was found to have wrongly repudiated the contract, resulting in loss and damages suffered by the plaintiff. The High Court then ordered for the first defendant to pay damages to be assessed by the Registrar.

[28] The claim against the second defendant was however dismissed because the High Court found no binding contractual relationship with the second defendant. The purported LOA and various correspondences upon which the plaintiff postulated a binding contractual relationship were correspondences issued by the first defendant and never by the second defendant. In short, the trial judge found that there was no involvement of the second defendant to constitute a binding contractual relationship.

At The Court Of Appeal

[29] Arising from the High Court decision, the first defendant appealed against the finding of liability against it in Civil Appeal No: D-02(NCvC)(W)-431-03-2017 (431). The plaintiff also appealed against the dismissal of its claim against the second defendant in Civil Appeal No: D-02(NCvC)(W)-499-03-2017 (499).

[30] The Court of Appeal allowed the appeal by the first defendant in 431 and dismissed the appeal by the plaintiff in 499. It was held that there was no contractual relationship established between the first defendant and the plaintiff. The Court of Appeal noted the most crucial documents, in this case, were the LOI and the LOA, both of which did not carry the plaintiff's name 'Dae Hanguru Infra Sdn Bhd'. It was the observation of the Court of Appeal too that if at all there was any agreement or contract existed in respect of the project, it would be between the first defendant and CDJV but not with the plaintiff.

[31] The Court of Appeal found, more importantly, that the plaintiff was never a member of the consortium at the material time because the plaintiff was yet to be incorporated. Accordingly, there was no *consensus ad idem*, to create a contractual relationship between the plaintiff and the first defendant. The fact that the plaintiff was subsequently nominated as the consortium's contractor to implement the project, according to the Court of Appeal, would not regularise the lack of *consensus ad idem*; that being an essential ingredient to sustain a valid contract.

[32] The Court of Appeal noted the failed attempts to substitute CDJV for the plaintiff as the contracting party. It found no evidence of any novation of that contract to the plaintiff and eventually held that the plaintiff had failed

to establish any valid and enforceable contract under the law. Consequently, it held and found that since the plaintiff's prayer was focused on an enforceable contract and did not plead a lesser form of agreement, no payment could be made under other heads recognised in the Contracts Act 1950, and the appeal of the plaintiff was dismissed.

[33] Two separate appeals are brought before this court by the plaintiff on the decision of the Court of Appeal. As alluded to earlier, we will be dealing only with Appeal 32 in this judgment.

At The Federal Court

[34] At the hearing of this appeal we were posed with the three following questions of law:

(i) whether the rule on pre-incorporation contracts as stated by the Privy Council in *Cosmic Insurance Corpn Ltd v. Khoo Chiang Poh* [1980] 1 LNS 182; [1981] 1 MLJ 61, PC, and restated by the Court of Appeal in *The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd* [2006] 1 CLJ 259; [2006] 1 MLJ 554, applies to a successor company like the applicant whose principal had contracted on its behalf for it to undertake the project works?;

(ii) where by conduct and dealings the party awarding the contract had recognised and dealt with the successor company as the party undertaking the contract works, whether it was barred by estoppel from asserting subsequently that the successor company was a non-party and therefore not entitled to any rights under the contract?; and

(iii) whether the principle stated by the UK Supreme Court in *RTS Flexible Systems Ltd v. MA Muller GMBH & Co* [2010] 1 WLR 753 that a preliminary exchange of documents between the parties like a letter of intent could reflect a *consensus ad idem a*nd an intention to create legal relations, and that the principle 'applies to construction contract as well' would make unsustainable the legal position expressed by the Court of Appeal that they reflect a 'loose arrangement' 'lacking in ...' '*consensus ad idem*' or 'the status of a contract'?

Our Deliberation

[35] There was a great deal of confusion made by the High Court when it held that a valid contract was concluded between the first defendant with CDJV and "later" with the plaintiff. It was not made clear by the High Court as to how a valid contract between the first defendant metamorphosed later into a contract with the plaintiff. No legal analysis was undertaken by the High Court to conclude how the plaintiff suddenly stepped into the shoes of CDJV. To muddy the issue further whilst holding that there was a binding contract with CDJV, at the same time it had also found a valid contract to have emerged between the first defendant and the plaintiff, for various

reasons adverted to in the grounds of judgment. Yet again the High Court too found a binding contract with the plaintiff because the plaintiff was part of CDJV or one of the same, or CDJV was a promoter of the plaintiff.

Contract With CDJV

[36] We will first focus on the High Court's finding *vis-a-vis* CDJV. A few reasons were proffered to justify a valid agreement between CDJV with the first defendant. First, it gave due consideration to the LOI and the LOA, both issued by the first defendant to CDJV. In them, according to the High Court, all the main terms of the contract including the proposed project, contract ceiling price and the construction period had been identified by the first defendant, which in His Lordship's view had concluded the main terms of the agreement between them. Emphasis was paid by the High Court on what it found to be strong words used by the first defendant in the said letter, namely "we hereby appoint you as the turnkey contractor". This was held to be clear proof that the first defendant had already chosen CDJV.

[37] Much emphasis was also placed on the pleadings of the first defendant, where the High Court found para. 5 of the re-amended defence dated 25 September 2015 amounted to an admission by the first defendant that there was a binding contract with CDJV. Such admission according to the High Court was reinforced by the dismissal of the first defendant's application to amend that pleading.

[38] Given that the law in this area is quite settled, a letter of intent duly signed and accepted by both parties operates in construction law as a valid contract although a formalised contract may be envisaged later as work progresses. This position was made clear by the leading decision of the UK Supreme Court in *RTS Flexible Systems Ltd v. Molkerei Alois Muller GMBH & Co KG (UK Production)* [2010] 1 WLR 753. In that case, a letter of intent upon which contract work commenced with a formal contract to be executed later between the parties was found to be binding. The principle of law in this area in fact is very much dependent on the construction of the letter of intent itself and subject to the facts and circumstances of each particular case.

[39] The following observation by Nicholas Dennys and Robert Clay in *Hudson's Building & Engineering Contracts*, (13th edn, Sweet & Maxwell 2015) at p. 373 is instructive:

> Given the different meanings assigned to letters of intent, they must be drafted with all the care usually devoted to any other one-off contract. Since it is usually issued at a time when the parties have not quite reached agreement, particular care must be taken to make clear whether the letter is intended to have a limited effect, or whether it is intended to cover the whole work. It is submitted that clarity is essential for the protection of both parties:

[40] This trite legal position has been accepted in our jurisdiction in the decision of this court in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754 and *Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor* [2015] 8 CLJ 1068; [2015] 6 MLJ 310.

[41] The High Court here had considered the LOI and LOA during the trial and had tested them against the evidence before it, to conclude a binding contract between the first defendant and CDJV. The conclusion arrived at by the High Court was based on the facts and evidence before it and there was no further appeal on this finding as CDJV was not even a party to the proceedings before the High Court.

[42] This finding is useful for the purpose of this appeal in one aspect. A binding contract with CDJV may prove to bind the plaintiff if the legal requirements encapsulated in s. 35 of the Companies Act 1965 are met. The principle of law applicable will be deliberated in this judgment.

Contract With The Plaintiff

[43] Before addressing the applicability of s. 35, it would be pertinent to first deal with the judgment of the High Court concerning the contractual position with the plaintiff. The case of the plaintiff was grounded on the premise of a binding contract directly with the first defendant. The plaintiff contended a binding contract came in two folds; that is by the conduct of the parties and by the doctrine of estoppel. To be noted, no material facts though have been pleaded to sustain the application of the doctrine of estoppel.

[44] Having given full scrutiny of the grounds of judgment of the High Court, we have difficulty reconciling His Lordship's finding that there was a valid agreement between the plaintiff with the first defendant. With respect, we are not able to agree with the High Court that a binding contract between the first defendant and the plaintiff existed on reasons proffered. In this, we agree with the Court of Appeal that no contract had been concluded between the plaintiff and the first defendant because there was no *consensus ad idem*.

[45] One of the essential requirements to form a valid contractual relationship is indeed the meeting of the mind, or *consensus ad idem*. It was held by the Court of Appeal there was no meeting of minds between the first defendant with the plaintiff. For one thing, if there was a valid contract as found by the High Court between the first defendant and CDJV, it is inconceivable that the same contract would also bind the plaintiff. It can only be so upon a novation of that contract making plaintiff a contracting party. The Court of Appeal was correct to find that though there was an attempt to substitute CDJV for the plaintiff as the contracting party, it was not successful, and there was no evidence of any novation.

[46] Moreover, the plaintiff cannot be said to even represent any of the CDJV members as evidenced from the negative responses to the first defendant's queries. The binding effect of the LOI and LOA, if at all, did not concern the plaintiff. As rightly observed by the Court of Appeal these letters were all addressed to CDJV and not the plaintiff, because the plaintiff never existed at the material time.

[47] In holding that there was a binding contract with the plaintiff the High Court cited reasons *inter alia*, the conduct of the first defendant's agent JPZ which issued about eight correspondences addressing the plaintiff as a contractor. These correspondences were construed to form an acknowledgment of the plaintiff as the contractor, and it was intended for a binding contractual relationship between the first defendant and the plaintiff. The High Court further considered a draft agreement prepared by the plaintiff which was circulated at the meeting of 29 January 2013 citing itself as a party, instead of CDJV.

[48] The grounds relied upon by the High Court hardly support a meeting of minds between the first defendant with the plaintiff. The correspondences which addressed the plaintiff as the contractor is neither here nor there. The draft agreement prepared by the plaintiff was self-serving and the facts showed that it had led the first defendant to an immediate enquiry. A draft agreement remains a draft. It is no proof of a consensus of mind until executed. It was because this draft agreement cited the plaintiff as a party that had brought to the fore that the plaintiff and CDJV are not one of the same. This then led to the first defendant raising the question of whether CDJV had unilaterally changed the party from CDJV to the plaintiff. Such unwarranted deduction by the High Court was thus made without considering what constitutes a valid agreement in law.

[49] The proposal of new terms in the plaintiff's proposal dated 12 February 2013 differing from the ones stated in the LOI and LOA issued to CDJV was another compelling evidence against the plaintiff's case. In that plaintiff's proposal, the plaintiff sought financial support from the first defendant for the project, which included the request for the first defendant to grant the plaintiff a contract to operate the Kelantan State Government's quarry site, to supply not just for the project but also to be given exclusive right to supply to other projects in Kelantan and its neighbouring States. There was also a request by the plaintiff for the third-party guarantor (Perwaja Steel who was given licence for manganese mining operations) to guarantee a minimum payment of RM650 million to an escrow account for 15 years and at the same time, supply steel bars to the plaintiff for the project on a mutually agreed deferred-payment scheme. The plaintiff's proposal was on completely new terms. There was no evidence that any of these terms had been agreed to by the first defendant at any point in time to constitute a valid agreement between them.

[50] The High Court paid scant consideration to these material facts. It had failed to consider the relevant facts and evidence before it in their proper context to conclude that there was a binding agreement with the plaintiff. This finding lacks judicial appreciation, is not supported by any evidence and hence warranted appellate intervention.

[51] Instead of applying the basic privity of contract principles, what the High Court appeared to have done was to selectively look for bits and pieces of evidence to support its conclusion and overlooked all the evidence which showed there was no concluded contract. Of the letters that it had considered, it extracted words and phrases in isolation from the rest, often without considering the context. To adopt and paraphrase what this court had observed in *Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor* (*supra*), he "picked up isolated bits of the correspondences to find *consensus ad idem* on the terms. Except that the correspondences had a different tale." The High Court had conflated the issues on what constitute a valid contract and the principle of privity of contract has not been adhered to.

[52] In law, a binding contract with one party cannot bind another party without any proper novation being made to bind that new party. The Court of Appeal correctly concluded that there cannot be a binding agreement between the first defendant and the plaintiff even if there was a binding agreement between the first defendant and the CDJV.

Estoppel

[53] The other contention of the plaintiff's case is that the doctrine of estoppel disallowed the first defendant from denying a contract with the plaintiff. Despite the non-pleading of the material facts to contend estoppel, the plaintiff complained that the High Court had not addressed this issue. The arguments put forth in relation to estoppel the way we understand are these: The High Court had found the conduct of the first defendant amounting to an acknowledgment and recognition of the plaintiff as the contractor. It was argued that with that recognition given by JPZ which represented the first defendant, then the first defendant is estopped from denying the existence of a contract with the plaintiff.

[54] The plaintiff advanced a case of estoppel by relying on the High Court case of *Teras Kimia Sdn Bhd v. Kerajaan Malaysia* [2013] 6 CLJ 219; [2014] 7 MLJ 584. In *Teras Kimia* (*supra*), the doctrine of estoppel was applied to allow the plaintiff's claim against the defendant in that case, due to the fact that the defendant had benefited from the work and services. The facts before us are totally different.

[55] In the case before us, the specific expenses agreed on above are quite a separate arrangement. It was in a meeting dated 29 January 2013 followed by a letter issued on 18 February 2013 by the first defendant, where it was clearly articulated that the first defendant would only pay for these

preliminary works. The letter too clearly stated that such payment would be made in the event that the contract between parties never materialise. In this regard, we agree with the submission of the first defendant which hinges on the principle of law in *British Steel Corporation v. Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504. The legal principle is that a party will be paid on the basis of *quantum meruit* pending a formalisation agreement. This principle of law is required in s. 71 of the Contracts Act 1950. This arrangement cannot form the basis to estop the first defendant from denying the existence of a contract for the project between them. On the facts of this appeal clearly, there is no room for the application of estoppel.

Whether Section 35 Applies

[56] In applying s. 35 of the Companies Act 1965, the High Court had done so predicated on two more conflicting findings; that the plaintiff and CDJV were of the same entity and the contract purportedly concluded through the LOI and LOA was entered into by CDJV on behalf of the plaintiff prior to its formation. Having so concluded it went on to rely on the principle of promoter and successor under s. 35(1) of the Companies Act, and the principle enunciated in the Court of Appeal case of *The Golf Cheque Book Sdn Bhd & Anor* (*supra*), to hold that there is a binding contract between the first defendant and the plaintiff.

[57] The mainstay of the plaintiff's submissions before us was on this principle, to contend a binding contract between the plaintiff and the first defendant existed. It was posited that this principle applied squarely to the facts of this appeal. This doctrine, it was submitted, was enunciated by the Privy Council in *Cosmic Insurance Corpn Ltd v. Khoo Chiang Poh* [1980] 1 LNS 182; [1981] 1 MLJ 61, PC and restated by the Court of Appeal in *The Golf Cheque Book* (*supra*).

[58] The plaintiff criticised the Court of Appeal for failure to address s. 35 in its judgment. For the first defendant, it was argued that the plaintiff had not pleaded the material facts to sustain this argument.

[59] On this pleading point, the plaintiff had brought our attention to paras. 6 and 11 of its statement of claim to contend that the material facts to apply s. 35 had been so pleaded. It was pleaded in para. 6:

> 6. In a Letter of Acceptance dated 31 October 2012, the 1st Defendant accepted **the CDJV (and subsequently the plaintiff's)** "Proposal for Kota Bharu-Kuala Krai Expressway Construction Project" at a Guaranteed Maximum Price of Ringgit Malaysia One Thousand and Eight Hundred Million only (RM1,800,000,000.00). (emphasis added)

Almost similar pleading appeared in para. 11, wherein stated:

> ... pursuant to the 1st Defendant's Letter of Acceptance dated 31 October 2012 there was a concluded contract between the 1st Defendant acting for and on behalf of the Kelantan State Government's State Agency which was the 2nd Defendant **and CDJV/the plaintiff** ...
>
> (emphasis added)

[60] One look at the above pleadings, in our view, cannot be said to have addressed the material facts upon which the legal principle of promoter and successor was grounded. Material facts must be specifically pleaded. The words "the first defendant accepted the CDJV (and subsequently the plaintiff's)" in para. 6 above is meaningless because it did not plead how that subsequent fact of promoter and successor came about. The pleading at para. 11 "CDJV/the plaintiff" and the backslash "/" between the words "CDJV" and "plaintiff" cannot be expanded to mean that the LOI and LOA issued by the first defendant to CDJV were on the basis that CDJV was the promoter of the plaintiff.

[61] It would have been easier, plain and simple and indeed consonant with the salutary rule of pleadings if the plaintiff in specific terms pleaded that it was indeed a successor company to CDJV or that CDJV had entered into the negotiation or agreement on behalf of the plaintiff to anchor its reliance on s. 35. The inexplicable reluctance to plead in clear terms must have caused all the confusion at trial, which evidently culminated into a confusing decision by the High Court. However, since the pleading point has not been raised in any of the questions of law before us, we will refrain from making any ruling on the same, though such form of pleading leaves much to be desired.

[62] Giving the greatest latitude to the plaintiff on its pleading point, let us now consider how the High Court applied this legal principle in its grounds of judgment. In concluding that s. 35 applied, the High Court proceeded to rely on five reasons, which were these:

(i) it was at the request of the first defendant that CDJV incorporated the plaintiff;

(ii) the first defendant had agreed to appoint the plaintiff provided the shareholders of which are the same entities within CDJV;

(iii) the plaintiff's conduct in taking charge and being actively involved in meetings with the first defendant amount to a recognition of the plaintiff as a contractor;

(iv) the conduct of parties demonstrates the incorporation of the plaintiff as the turnkey contractor was acceptable to the first defendant, and that the withdrawal of CDJV did not alter that relationship between parties; and

(v) the first defendant's request for the plaintiff to construct a 13km highway.

[63] It is worthy of emphasis that the finding made by the High Court in one breath was that CDJV and the plaintiff were the same entity, as articulated in paras. 47, 67, 87 and 92 of the grounds of judgment of the High Court. At the same time, it was held that the contract purportedly concluded with CDJV was entered into by CDJV on behalf of the plaintiff prior to its formation (see para. 113). This contradictory finding was the basis upon which the High Court applied the principle of promoter and successor pursuant to s. 35(1) of the Companies Act. The High Court had also considered this principle in the light of the Court of Appeal's decision in *The Golf Cheque Book Sdn Bhd & Anor* (*supra*).

[64] It would be opportune at this juncture to appreciate the principle of law in this regard. In common law, a company is not bound by a pre-incorporation contract, because a company cannot enter into any contract before incorporation due to a lack of legal entity. It has no separate legal existence until incorporation, as decided in *Black v. Smallwood* [1966] ALR 744. Neither can it appoint an agent before incorporation as stated in *Kelner v. Baxter* (1866) LR 2 CP 174. Thus, a company cannot ratify an agent's action as any ratification has to be retrospective to the date of the transaction at which point the company was non-existent.

[65] In Malaysia, this common law position has been altered and enacted into s. 35(1) and (2) of the Companies Act 1965 which has now been legislated slightly differently in s. 65(1) and (2) of the Companies Act 2016.

[66] We reproduce below the said s. 35 of the Companies Act 1965 for ease of reference:

> Form of contracts.
>
> 35. (1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any **person on behalf of a company prior to its formation may be ratified** by the company after its formation and thereupon the company **shall become bound** by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.
>
> (2) Prior to ratification by the company the person or persons who purported to act in the name or on behalf of the company shall in the absence of an express agreement to the contrary be personally bound by the contract or other transaction and entitled to the benefit thereof.
>
> (emphasis added)

[67] There are twin legal requirements under s. 35(1) before a pre-incorporated contract can be binding. First, it must be a contract made on behalf of the company (in this case the plaintiff) prior to its incorporation. Secondly, that contract must be ratified by the company once incorporated.

[68] On the facts of the instant appeal, besides the lack of pleaded facts to that effect, there was no evidence to support the plaintiff's case. Had CDJV indicated at the outset that it was negotiating and was intending to enter into the agreement on behalf of the plaintiff, the first defendant would not need to clarify the status of the plaintiff *vis-a-vis* CDJV, in its letter of enquiry sent to CDJV members.

[69] In fact, the evidence to the contrary was aplenty. Upon enquiry by the first defendant from Daelim Consortium and all the consortium members, none of them replied positively to lend any support to the plaintiff. Far from saying that they were negotiating or entering into the agreement on behalf of the plaintiff, they instead counter-offered their respective terms to the first defendant.

[70] Also, it is not sustainable to say that CDJV had entered into the agreement on behalf of the plaintiff, when the plaintiff's proposal in its letter dated 12 February 2013 offered terms very differently from the LOI and LOA issued to CDJV. These new terms had caused the first defendant at the meeting on 30 April 2013, to insist that it would not deviate from the original understanding with CDJV on the project. All these go to show that the plaintiff and CDJV do not even share a common idea on the terms of the agreement for the project, let alone to enter into negotiation on behalf of the plaintiff. This is another unsubstantiated finding by the High Court when it concluded that CDJV was contracting on behalf of the plaintiff.

[71] The Privy Council in construing a similar provision of the Companies Act of Singapore in *Cosmic Insurance Corporation Ltd v. Khoo Chiang Poh* (*supra*) held that there was a pre-incorporation contract under the Singapore Companies Act in that case, because it was made on behalf of a pre-incorporated entity which was subsequently ratified by the resolution of the directors. It was similarly held by the High Court in *Ahmad Salleh & Ors v. Rawang Hills Resort Sdn Bhd* [1995] 4 CLJ 197; [1995] 3 MLJ 211 that when both requirements are mandated by s. 35, a promoter and a successor contract is binding.

[72] The Privy Council in *Cosmic Insurance Corporation Ltd* (*supra*) held that in applying that section, a trial judge was to determine two main issues: first, whether a letter signed by the respondent together with another 11 persons, in that case, was a pre-incorporation contract, signed as an agent of the company which was subsequently incorporated. The second issue was if that letter constituted a contract, was it ratified by a resolution of the appellant's directors.

[73] Lord Roskill in *Cosmic Insurance Corporation Ltd* (*supra*) observed three requisite conditions to be fulfilled before s. 35 can be said to have been met and they are these:

A (i) the contract must purport to have been entered into by any person on behalf of the company prior to its formation;

(ii) that contract is ratified by the company after its formation; and

(iii) such contract upon ratification is pre-dated to the date it was made.

B **[74]** On the facts of this appeal, the LOI and the LOA were never proved to be made for and on behalf of the pre-incorporated plaintiff. No one from either side testified at the trial and none of the plaintiff's witnesses even testified that Daelim Consortium was its promoter. There was no evidence that the said agreement was either novated or assigned to the plaintiff to make C it a party. Further, there were no documents or any other evidence to sustain that Daelim Consortium was the plaintiff's promoter. All of Daelim Consortium's documents show it was acting for itself. The plaintiff never raised this point with any of the defendant's witnesses but did so for the first time in the plaintiff's submissions before the High Court.

D **[75]** The plaintiff's proposal on the financial arrangement which differed from the LOI and LOA issued to the CDJV by the first defendant was akin to a counter-proposal by the plaintiff. So how is the plaintiff to argue that it is indeed the same entity with CDJV or that CDJV was contracting on its behalf.

E **[76]** Evidently, Daelim Consortium had indeed procured the LOI and LOA for itself, not as a promoter and never for the plaintiff. Daelim Industrial Co Ltd in fact told the first defendant it would carry out the project through Daelim Consortium. Daelim Consortium's proposal set out its credentials, with Daelim Industrial Co Ltd playing the major lead role.

F **[77]** It was only after evaluating Daelim Consortium's proposal that the first defendant's board "bersetuju dan meluluskan pelantikan kontraktor Konsortium Daelim JV sebagai kontraktor bagi pembinaan Lebuhraya Kota Bharu – Kuala Krai" and that "Pengurusan diminta supaya mengeluarkan G dengan segera surat terima tawaran (letter of acceptance) kepada Konsortium Daelim JV."

[78] Furthermore, in a promoter-successor scenario, the promoter should exit from the scene as soon as the successor is formed to take over. That was not the case here. The plaintiff was incorporated on 3 December 2012 and H the first defendant continued to deal with Daelim Consortium on the contractual issues and never dealt with the plaintiff as if it were a successor. In evidence after the incorporation of the plaintiff, Daelim Consortium had visited and continued discussions with the State Government over the project together with its Korean bankers. JPZ too continued to communicate with I CDJV on the costing of the project as well as the various comments on CDJV's proposal of the project.

[79] Despite all these facts, in para. 113 of his judgment the learned trial judge still accepted the promoter-successor scenario: A

> Based on the facts above, this court opined that the contract which was concluded on 31.10.2012 was entered into by CDJV on behalf of the plaintiff prior to its formation as per the law in *The Golf Cheque Book*'s case. The conduct of the plaintiff satisfying the contract can be seen when the plaintiff actively took charge and wrote numerous correspondences to JPZ and the 1st Defendant, attending site meetings and also commencing works in executing the said contract. B

[80] With respect, the learned trial judge had erred in holding that the plaintiff's conduct proved the promoter-successor scenario. It is a finding bereft of any evidential proof which warrants appellate intervention. C

[81] The second requirement under s. 35, is ratification by the successor company of the agreement entered on its behalf. We too find no evidence of such. Plaintiff's counsel submitted that SP7 (Zaidon) had confirmed the act of ratification in his evidence. The learned Judicial Commissioner at D paras. 113 and 114 of the grounds of judgment concluded that there was ratification by conduct when the plaintiff actively took charge attending meetings and corresponded with JPZ and commencing works. He held that oral evidence by the director of the plaintiff (SP7) (Zaidon) was a confirmation of that ratification. This requirement of ratification did not E arise in this case as the plaintiff had failed to fulfil even the first requirement. Hence any finding made on the issue of ratification would be purely academic.

[82] The plaintiff's reliance on *The Golf Cheque Book Sdn Bhd & Anor* (*supra*) is misplaced. This case concerned a striking out application made under F O. 18 r. 19 of the then Rules of the High Court 1980. The Court of Appeal did not allow striking out, adopting the principle of promoter successor, that a contract made by a promoter on behalf of a yet to be incorporated company may in certain cases be binding. Giving cognisance to this principle of law the Court of Appeal applied s. 35. In that case, LH Wong was the promoter G who entered into an agreement on behalf of the pre-incorporated company Golf Cheque Book Sdn Bhd. Hence, the first requirement of s. 35 was met. As to whether or not there was ratification made as required under that section was to be determined at trial. That was the basis why the Court of Appeal, in that case, disallowed striking out, and remitted the case back to H the High Court to determine if there is any ratification.

[83] In the present case, the learned High Court Judge never considered the requirements of s. 35 in concluding that the purported agreement with the CDJV had consequently transformed into a promoter and successor contract with the plaintiff. The High Court had seriously erred in applying s. 35 to I the facts of this case, first by making an erroneous finding on the facts and second, without considering the two legal requirements of that section.

A

Questions Of Law And Conclusion

[84] Let us now revert to the questions of law posed in this appeal. We agree with the first defendant that the questions posed are subject to factual findings and cannot be answered without determining the factual issues first. The promoter and successor principle was not established factually to enable questions on the application of this principle of law to be answered. As such, we decline to answer all the questions posed.

B

[85] For all the reasons above stated we unanimously dismiss the appeal of the plaintiff with costs and affirm the decision of the Court of Appeal.

C

[86] In view of our decision, on the application by learned counsel for the plaintiff to withdraw Civil Appeal No: 01(f)-33-11-2020 (D), we allowed the application and struck out the appeal with costs.

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